

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 175

This advisory opinion is issued in response to a request for the Ethics Commission [Commission] to determine whether a City employee who is an engineer may properly have outside free-lance¹ employment in sales when his official duties include approval of plans submitted for building permits.

The Commission does not believe any free-lance selling is compatible with an employee's official duties when they include approving building plans.

The Commission understands the facts to be as follows:

The employee is an engineer whose duties include approval of plans submitted for building permits. He uses guidelines and his own judgment to decide whether or not such plans meet code requirements.

He also has outside employment selling goods for a company [Company X]. He sells such goods at retail within and free-lance outside of Company X's place of business.

The question presented is whether an employee's authority to approve plans submitted by the public for building permits constitutes "police power" so that outside employment as a free-lance salesperson is incompatible with the official approval authority.

¹ "Free-lance" as an adjective means "of, relating to, or being ... independent;" as a verb means "to produce and submit ... in the manner of a free lance;" and as a noun means "one who acts independently without regard to party lines or deference to authority" and "one who pursues a profession without long-term contractual commitments to any one employer." Webster's New Collegiate Dictionary. 491 (9th ed. 1986).

The Commission also uses "free-lance" selling to differentiate from retail selling, which is selling within the structural confines of a place of business. A "free-lance" salesperson may solicit sales from anyone outside of the physical place of business. In contrast, a retail salesperson only sells during assigned hours inside the place of business to potential customers who appear of their own accord.

The general rule has long been that free-lance selling is incompatible with official duties when such duties include public police powers. See, e.g., Advisory Opinion No. 1 [AO #1]². For example, in AO#1, the Commission stated in pertinent part as follows:

[A]ny employee of the City invested with public police powers by virtue of his [or her] position should not engage in outside free-lance selling activities, such as the selling of real estate or of insurance, where an element of solicitation exists. We [the Commission] maintain this position irrespective of whether or not such solicitation involves persons or businesses which the solicitor, as a City inspector, has a duty to police. (Emphasis added)

"Public police powers" include the official duties to inspect, approve, or investigate, for example, drinking establishments, AO #1; existing dwellings on a house-to-house basis, for housing code violations, AO #8, AO #12; plumbing fixtures in existing buildings, AO #16; electrical systems in existing buildings, AO #24; and fire extinguishing systems in buildings, AO #78.

The Commission believes that the employee's authority to approve plans submitted for building permits is another example of public police power with which free-lance selling is incompatible. The distinction between inspecting existing structures and approving plans for building new structures is not sufficient to alter his authority to enforce public compliance with the law. Therefore, the City agency involved should not allow him to pursue free-lance sales as outside employment.

In conclusion, the employee is an engineer and has discretionary authority to approve building plans submitted for permits by the public. He also sells goods free-lance, an activity which requires solicitation. The Commission believes his discretionary approval authority is a

² When the Commission issued AO #1 on June 7, 1967, it believed free-lance selling was incompatible with the official duties in question under Section 11-101.3 of the City's Charter, which has since been revised and renumbered Section 11-102.3 in the Revised Charter of the City & County of Honolulu 1973 (1984 Ed.). However, the substance of Section 11-101.3 and of the revised Section 11-102.3 is the same. These sections state as follows:

Section 11-101.3:

No appointed officer or employee may engage in outside employment or in any business or professional activity which may impair his independence of judgment in the exercise of his official duties, ... or which is otherwise inconsistent or incompatible with or which interferes with the proper discharge of his official duties.

Section 11-102.3:

No elected or appointed officer or employee shall ... [e]ngage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

Therefore, AO #1 may serve as precedent for this advisory opinion because the standard of conduct on which the Commission based AO #1 has the same meaning as the present version.

form of police power that is incompatible with outside employment as a free-lance salesperson under precedent established in previous advisory opinions. Therefore, the Commission believes he should not be allowed to pursue outside employment as a free-lance salesperson.

Dated: September 2, 1987

JANE B. FELLMETH
Chair, Ethics Commission